

COURT OF APPEALS
DIVISION II

09 FEB -6 PM 12:01

NO. 37854-0-II

STATE OF WASHINGTON
BY [Signature]

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HOME DEPOT, USA, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

**SUPPLEMENTAL BRIEF OF RESPONDENT
SUBMITTED PER RAP 10.1(h)**

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FILED

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The State moved to strike portions of Home Depot's reply brief. Commissioner Schmidt denied the motion, but allowed the State to file a five-page supplemental response, as authorized by RAP 10.1(h).

A. Home Depot's New Argument That It And GE Capital Are A Single "Person" Under RCW 82.04.030 Should Be Rejected.

During summary judgment proceedings below and in its opening appellate brief, Home Depot argued it was entitled to a refund because RCW 82.08.037 does not require the party claiming a bad debt sales tax credit to be the same party that incurred a bad debt loss. Relying on RCW 82.04.030, Home Depot now argues that it and GE Capital are *a single person* for purposes of the bad debt statute. Reply Brief at 6, 8-10, 21-22. This court should not address Home Depot's new argument. *See* RAP 9.12; RAP 10.3(c). If it does, however, this court should reject Home Depot's new argument. It is well-settled under Washington law that separate corporations are separate "persons" for tax purposes.

RCW 82.04.030 provides:

"Person" or "company", herein used interchangeably, means **any individual**, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, **corporation**, limited liability company, association, society, **or any group of individuals acting as a unit**, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the

United States or any instrumentality thereof. (Emphasis added).

Home Depot argues that it and GE Capital should be considered a single “person” because they are a “group of individuals acting as a unit.” Reply Brief at 6, 8-10, 21-22. This argument fails for at least two reasons. First, Home Depot and GE Capital are not a “group of individuals” because neither entity is an “individual.” Second, Home Depot and GE Capital are not “acting as a unit” because they are on opposite sides of an arms-length commercial transaction, with separate interests.

In *Nordstrom Credit, Inc. v. Dep’t of Revenue*, the Washington Supreme Court addressed a similar commercial relationship between a retailer and financing company. 120 Wn.2d 935, 845 P.2d 1331 (1993). That case involved a financing company that owned and administered credit accounts for an affiliated retailer’s customers. The financing company argued the two corporations should be considered a single “person” for purposes of RCW 82.04.460, a statute allowing tax apportionment for multi-state business activities. 120 Wn.2d at 941-42.

The *Nordstrom* court disagreed, stating “Nordstrom independently conducts collection activities; Nordstrom does not act as Credit’s agent in these endeavors, nor do Nordstrom and Credit constitute a unitary

business. Rather, Credit and Nordstrom engage in ‘arms length’ sales transactions.” 120 Wn.2d at 942.

Here, as in *Nordstrom Credit*, Home Depot and GE Capital were engaged in arms-length commercial transactions, not “acting as a unit” within the meaning of RCW 82.04.030. *See* CP 93, 153, 160, 217 (“All credit losses on Accounts shall be solely borne at the expense of Bank and shall not be passed on to Retailer . . . Retailer has no interest in the Accounts or Indebtedness created in connection with the Program.”). Because Home Depot and GE Capital are separate corporations with distinct interests, they are not a single “person.” *See* WAC 458-20-203.

Washington courts will disregard a corporate entity’s separate legal status only to prevent wrong-doing, not to allow a tax benefit. *Nordstrom Credit*, 120 Wn.2d at 941; *Impeccoven v. Dep’t of Revenue*, 120 Wn.2d 357, 361, 841 P.2d 752 (1992); *Washington Sav-Mor Oil Co. v. Tax Commission*, 58 Wn.2d 518, 364 P.2d 440 (1961). Just as Nordstrom Credit could not attribute Nordstrom’s out-of-state activities to itself for purposes of tax apportionment, Home Depot cannot attribute GE Capital’s bad debt losses to itself for purposes of a bad debt sales tax refund.

B. Home Depot’s Unsubstantiated Assertion That It Prevailed In Other Jurisdictions Should Be Disregarded.

This court also should disregard Home Depot's bald assertion that "twenty states have granted Home Depot's sales tax refund claims, or allowed credits, without any opposition." Reply Brief at 15-16. Home Depot's assertion ends with a list of 16 states and the District of Columbia, but no citation to the record or legal authority, contrary to RAP 10.3(a)(6); *State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1996).

Taxpayer confidentiality laws in those states generally prohibit the public disclosure of administrative actions granting or denying an identified taxpayer's credit or refund claim. So it is impossible for the State to refute conclusively Home Depot's assertion.

However, all of the *publicly available* decisions addressing Home Depot's refund theories have been adverse to Home Depot. *See* Respondent's Brief at 2, n.2 (listing decisions). This suggests the 17 taxing jurisdictions that allegedly "granted" Home Depot's refund claims or credits probably have not yet audited its tax returns.

Our brief research into the sales tax laws and rules of most of those jurisdictions suggests it is highly unlikely their revenue agencies would have consciously accepted any of Home Depot's strained legal theories.

For example, in Idaho, Iowa, Nebraska, New Mexico, Minnesota, and Virginia, and West Virginia, a refund claimant must be the party that

incurred a deductible bad debt to qualify for a tax refund.¹ In Louisiana, Maine, Massachusetts,² Missouri, and Wisconsin, courts have disallowed a refund claim based on bad debts incurred by any party other than the retailer.³ Colorado does not have a bad debt sales tax statute.⁴ Finally, Hawaii could not have granted Home Depot a sales tax refund because it does not even have a sales tax.

¹ See IDAPA 35.01.02.063.07 (Idaho Sales & Use Tax Administrative Rule 63) (“The person claiming the credit must be the person who ultimately bears the loss if the purchaser of the property defaults on the obligation to repay”); *In re Redacted Taxpayer’s Identity*, Docket No. 15551 (Id. St. Tax. Com., December 23, 2002), 2002 WL 34140169 (third party lender may claim bad debt refund if it *incurs bad debt loss*) (applying Idaho Code §63-3613(d)); Iowa Code § 423.21.3 (amounts claimed must be “written off as uncollectible *in the seller’s books and records*”) (emphasis added); Minn. Stat. § 297A.81.1 (deduction for “a *debt owed to the taxpayer* that became uncollectible”) (emphasis added); Revenue Notice No. 2005-07 (Minn. Dept. Rev., July 18, 2005), 2005 WL 1874441 (claimant must prove it incurred a deductible bad debt loss); Neb. Rev. Stat. § 77-2708(2)(j)(ii) (deduction for amounts “written off as uncollectible *in the claimant’s books and records*”) (emphasis added); N.M. Stat. Ann. 1978 § 7-9-67 (deduction for “amounts *written off the books* as an uncollectible debt *by a person reporting gross receipts tax on an accrual basis*”) (emphasis added); Va. Code Ann. § 58.1-621 (tax credit “on accounts *which are owed to the dealer* and which have been found to be worthless”) (emphasis added); W. Va. Code, § 11-15B-27(5)(c) (deduction for amounts “written off as uncollectible in the claimant’s books and records”) (emphasis added).

² Massachusetts’ bad debt claim form states an applicant that did not extend credit “cannot file a bad debt reimbursement claim for such sales.” See Appendix B.

³ See, e.g., *Daimler Chrysler Servs. of N.A., LLC v. Louisiana*, 970 So. 2d 616 (La. 2007) (assignee not entitled to bad debt refund); *Linnehan Leasing v. State Tax Assessor*, 898 A.2d 408 (Me. 2006) (retailer not entitled to sales tax refund for bad debts incurred by third party lender) (construing 36 Me. Rev. Stat. Ann. § 1811-A); *Household Retail Services, Inc. v. Comm’r of Rev.*, 448 Mass. 226, 859 N.E.2d 837, 842 (2007) (third party lender not entitled to bad debt refund; stating, in dicta, vendor *might* be entitled to bad debt refund if third party lender has *recourse against vendor* for uncollectible consumer debt); Mo. Ann. Stat. 144.010 (disallowing bad debt refund to seller’s assignee); *Sprint Communications Co. L.P. v. Dir. of Rev., State of Missouri*, 64 S.W.3d 832 (Mo. 2002) (denying refund petition to seller’s assignee); *Daimler Chrysler Servs. North America, LLC v. Wisconsin Dep’t of Rev.*, 298 Wis.2d 119, 726 N.W.2d 312 (2006) (affirming administrative regulation limiting bad debt credit to retailers that themselves incur deductible bad debt; assignee not entitled to deduction).

⁴ Colo. Rev. Stat. § 39-26-11(2).

RESPECTFULLY SUBMITTED this 5th day of February,

2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink that reads "Rosann Fitzpatrick". The signature is written in a cursive style with a large, stylized 'R' and 'F'.

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Washington State Court of Appeals
Division Two

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CASE #: 37854-0-II

Home Depot USA, Inc., Appellant v. Department of Revenue, State of WA, Respondent

Counsel:

The action indicated below was taken in the above-entitled case.

A RULING SIGNED BY COMMISSIONER SCHMIDT:

Appellant's motion to strike material in reply brief is denied. The State may file a supplemental response, not to exceed five (5) pages, within 20 days of the date of this ruling. No supplemental reply brief will be allowed.

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX A



Rev. 7/08

Massachusetts

Department of

Revenue

Form ST-BDR
Claim for Bad Debt Reimbursement

Legal name of taxpayer

Federal Identification or Social Security number

Street address

City/Town

State

Zip

Fiscal year-end date of federal return

Due date of federal return, including valid extensions

How often do you file your sales tax return?

☐ Annually ☐ Quarterly ☐ Monthly

Is the applicant a registered vendor in Massachusetts? ☐ Yes ☐ No. If No, the applicant cannot file a bad debt reimbursement claim.

Did the applicant make the retail sales for which tax was collected and remitted? ☐ Yes ☐ No. If No, the applicant cannot file a bad debt reimbursement claim for such sales.

Did the applicant extend credit to the retail customer at the time of sale? ☐ Yes ☐ No. If No, the applicant cannot file a bad debt reimbursement claim for such sales.

Did the applicant claim the amount listed on Line 5 as a bad debt expense deduction on its federal tax return? ☐ Yes ☐ No. If No, the applicant is not entitled to a bad debt reimbursement for such amounts.

Did the applicant assign, sell or transfer the debt in question to any other entity? ☐ Yes ☐ No. If Yes, the applicant cannot file a bad debt reimbursement claim, nor may the assignee, purchaser, transferee or factor of any such accounts.

1	Gross sales (including non-Massachusetts sales) for previous fiscal year	1	
2	Total gross Massachusetts sales for previous fiscal year	2	
3	Total taxable Massachusetts sales for previous fiscal year	3	
4	Total tax remitted for previous fiscal year. (If this amount does not equal 5% of line 3, attach an explanation)	4	
5	Bad debt expense per U.S. tax return (actual or pro forma; please attach) for previous fiscal year	5	
6	Amount of taxable sales (upon which tax has been remitted) determined to be worthless for previous fiscal year. (Attach an explanation for each worthless sale — see instructions)		
	Tangible personal property	+ Services	=
	<div style="border: 1px solid black; width: 150px; height: 20px;"></div>	<div style="border: 1px solid black; width: 150px; height: 20px;"></div>	6
7	Reimbursement for bad debts. Multiply line 6 by .05	7	

Under penalties of perjury, I declare that the taxpayer named above was the vendor in the sales that have become bad debts and is not an assignee or factor of that vendor. I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete. (Attach Form M-2848, Power of Attorney, if representing taxpayer.)

Signature _____

The

Date _____

Type or print name of signee

Daytime telephone number

If you wish to have a hearing in the event that this claim is denied in full or in part, you must indicate your request here. ☐ Yes ☐ No

Form ST-BDR Instructions

General Information

Under Massachusetts General Laws (M.G.L.), Chapter 64H, sec. 33 and M.G.L. Chapter 64I, sec. 34, Massachusetts sales tax vendors who have remitted sales or use tax to the Department of Revenue (DOR) on accounts which are later determined to be worthless may file a claim for reimbursement with DOR. This claim for reimbursement is effective for sales determined to be worthless in the previous fiscal year, regardless of when the actual sale occurred. **Bad debt reimbursements are issued without interest. Reimbursements may not be claimed on any other DOR return.** Form ST-BDR must be mailed on or before the due date (including extensions) of your federal income tax return for sales and use tax determined to be worthless in the previous fiscal year. If you discover an error in your claim after filing, you may file an amended claim *on or before* the due date (including extensions) of your federal income tax return, by clearly writing "amended" at the top of the claim form.

Vendors must include in gross receipts for their sales and use tax returns all sales for the period in which the sales occur, regardless of whether payment has been received. Vendors are **not** allowed to subtract bad debts from gross receipts. Reimbursements for bad debts can only be made on an annual basis with Form ST-BDR.

Any vendor who recovers, in whole or in part, a bad debt for which a reimbursement has been received must include the recovered amount in the gross receipts amount on the sales tax return covering the period in which the recovery occurs. For example, you are a quarterly sales tax filer who receives reimbursement for a 1999 bad debt of \$500. During the third quarter of 2000 you recover \$300 of the bad debt. You must include the \$300 recovery amount in your gross receipts on your third quarter return.

Taxpayers who change their fiscal year for federal tax purposes in tax years after 1999 may include in their ST-BDR claim for the first fiscal year after the change any bad debts incurred after the last day of their prior fiscal year and before the first day of their new fiscal year, providing that these claims have not been included in any other ST-BDR. See Technical Information Release (TIR) 00-3, Claiming the Bad Debt Reimbursement.

To correct errors unrelated to bad debts do not file Form ST-BDR. You must file an online Application for Abatement, at www.mass.gov/dor. For further information regarding abatements or Form ST-BDR call the Customer Service Bureau at (617) 887-MDOR.

Line Instructions

Line 1. Enter your gross sales (including non-Massachusetts sales) for the previous fiscal year.

Line 2. Enter your total gross Massachusetts sales (taxable and non-taxable) for the previous fiscal year.

Line 3. Enter your total Massachusetts taxable sales for the previous fiscal year.

Line 4. Enter the total amount of sales tax remitted to DOR during the previous fiscal year. If this amount does not equal 5% of line 3, attach an explanation.

Line 5. Enter bad debt expense as indicated on your U.S. tax return (actual or pro forma) for the previous fiscal year.

Line 6. Enter the amount of taxable sales (upon which a tax has been remitted) determined to be worthless during the previous fiscal year, regardless of when the actual sale occurred. For example, a 1997 credit sale may finally be determined to be worthless in 1999. Enter separate amounts of sales of tangible personal property and sales of services.

Line 7. Multiply the total in line 6 by .05 (5%). This is your reimbursement for bad debts.

Penalties. Applicants that made false statements on Form ST-BDR in order to receive a refund to which they are not entitled may be subject to the tax evasion penalties of M.G.L. Chapter 62C, sec. 73, including a felony conviction, a fine of not more than \$100,000 or \$500,000 in the case of a corporation, or by imprisonment for not more than five years, or both, and may also be required to pay the costs of prosecution.

Substantiating documentation. Substantiating documentation must be included with every claim. You must attach an explanation for each worthless sale showing the date the sale occurred, the amount of the sale, the buyer's name and address, the buyer's federal identification number, if available, and all facts pertinent to your determining the account to be worthless. If the volume of your sales or your method of determining sales to be worthless does not allow you to comply with the preceding instructions, please refer to TIR 00-3, Claiming the Bad Debt Reimbursement, for specific instructions. A sale is determined to be worthless when it is actually written off as uncollectible for federal income tax purposes under IRC Section 166.

You must also include:

- If you are using the specific charge-off or aggregated proration method for claiming bad debts, a copy of the page from your U.S. tax form (Form 1065, 1120, 1120A, 1120S or Schedule C or F) showing the bad debt deduction for the previous fiscal year; or
- If you are a cash method taxpayer, a detailed explanation of how sales are determined to be worthless.

Mail Form ST-BDR along with all attachments to: **Massachusetts Department of Revenue, PO Box 7031, Boston, MA 02204.**

COURT OF APPEALS
DIVISION II

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NO. 37854-0-II

STATE OF WASHINGTON
BY *LM*
DEPUTY

**COURT OF APPEALS, DIVISION II
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HOME DEPOT, USA, INC.,

Appellant,

v.

WASHINGTON DEPARTMENT OF
REVENUE,

Respondent.

**CERTIFICATE OF
SERVICE**

I certify that I served a true and correct copy of the Supplemental Brief of Respondent Submitted Per RAP 10.1(h) and this Certificate of Service, via U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of February, 2009, at Tumwater, WA.


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